IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 427

CITY OF HURON, a Municipal Corporation,

Petitioner,

vs.

T. G. EVENSON, Trustee,

Respondent.

REPLY BRIEF OF PETITIONER

MAX ROYHL
GEORGE E. LONGSTAFF,
Counsel for Petitioners.

INDEX

TABLE OF CASES CITED:

SOUTH DAKOTA STATUTES

TEXTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 427

CITY OF HURON, a Municipal Corporation,

Petitioner,

vs.

T. G. EVENSON, Trustee,

Respondent.

REPLY BRIEF OF PETITIONER

Because of misconceptions and misstatements found in the brief of the respondent, the petitioner feels it a duty to submit this reply brief.

The case of Gray v. City of Santa Fe, 89 F (2) 406, decided by the Circuit Court of the Tenth Circuit is not based upon any local rule and is not based upon any local statute. Indeed, Footnote 5 advises the reader that there is no decision of the Supreme Court of New Mexico, in which state the case arose. Nor do the cases in the Eighth Circuit upon which the respondent relies purport to be founded upon any local rule. City of McLaughlin v. Turgeon, 75 F (2) 402 is the controlling decision and this cites as a partial basis for its decision two South Dakota cases, Coolsaet v. City of Veblen 55 SD 485, 226 NW 726, and Freese v. City of Pierre, 37 SD 433, 158 NW 1013, which, as is pointed out in the brief of the petitioner are both cases involving an action by the contractor on his original contract with the city. The distinction is valid and is not assailed in any substantial way by the respondent. The contractor when he starts work has nothing but the promise of the city to pay

when the work is completed. When the improvement is done then the contract is at an end and the city levies or is supposed to levy the special assessments for the security and payment of the special assessment certificates or the bonds if they are issued in lieu of special assessment certificates. See Sections 6348, 6349, 6350, 6351, S. D. Revised Code 1919, providing for the making of the contract and Sections 6404 to 6409, inclusive, providing for the method of paying the contractor.* The contractor contracts with the city to perform the work and the city agrees to make available to him the statutory methods of payment. If it does not do so, and the work has been completed, naturally the damages recoverable would be the amount of the contract price. Such are the South Dakota cases cited by the Court in the McLaughlin case but distinguishable indeed is the case where the work has been done and the contractor has been paid the amount of his contract price and the purchasers of the bonds have taken them knowing that the security back of them is the amount of the contract price assessed against the real property benefited. Until it is shown at least that the security back of the bonds has been impaired by some default of the city, no cause of action has been established, other than nominal damages.

It is clear that in the Eighth Circuit Court case of City of McLaughlin v. Turgeon, supra, no effort was made to ascertain the local rule because there was no applicable decision of the Supreme Court of South Dakota and the statutes of South Dakota pertaining to damages which the petitioner has cited in its original brief, Sections 1959, 1960, 1965, 1966, 1984, 2003, S D. Revised Code 1919, were not examined and were not referred to in the least. These were the governing rules, absolutely ignored by the court. If the Court had applied a local rule, it would have been unnecessary to refer to cases from other jurisdictions. The important question from all of these cases is: What is the proper rule of dam-

* The procedure and the applicable statutes in the making of the contract and the raising of funds to pay the contractor are quite thoroughly described in Suttor v. Town of Wetonka 62 SD 339, 253 NW 64.

ages? The statutes of South Dakota and the decisions of the Supreme Court of that state establish that compensatory damages must be established by proof in the record, otherwise only nominal damages have been proved.

The respondent cites Section 1967 SD Revised Code 1919, which has never been referred to in any of the Eighth Circuit Court cases dealing with the question. That statute provides that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon. But the obligation of the City is not an obligation to pay money. Suttor v. Town of Wetonka, 62 SD 339, 253 NW 64. In this case, the relationship of the City to the bonds is stated as follows:

> "the municipal corporation is the instrumentality to make the improvement and collect the assessment without primary liability on its part." (Page 67 of 253 N. W.)

The statutes of the state in this case, it is said, do "not indicate an intention to shift the burden or any portion thereof from the property benefited to the municipal corporation." (Page 67 of 253 N. W.)

Repeatedly, the respondent attempts to create the impression that the city in this case owns special assessment certificates against the property benefited. This is not true. There are two methods in South Dakota of paying the contractor. See Suttor v. Town of Wetonka, **supra.** Payment could be by method of special assessment certificates in which the assessment was levied against each parcel of property and the certificate issued to the contractor. Section 6405 Revised Code 1919 as amended by Chapter 269 Session Laws 1919. The other method is of issuing and selling bonds to pay the costs of the improvement. Section 6409 SD Revised Code 1919 as amended by Chapter 319, Session Laws of 1921. The latter was the method followed in this case and when that is followed the special assessments are made a matter of record against the property and the city becomes

the owner of no certificate or other obligation or lien against the property. That is true in either case. These statements are merely attempts to mislead.

On Page 22, the respondent states the rule is that where bondholders with security for payment in the form of special assessments against the property benefited sue the city for damages, the bondholder need not prove the value of each parcel of property and the amount of general taxes against it. This is not the rule in South Dakota. There is no authority for such statement.

The respondent also attempts on Page 22 and 23 to argue that the City should prove facts in mitigation of the damages. Such duty of course cannot arise until the plaintiff has made out a case for other than nominal damages. The respondent is confused. The duty to mitigate damages arises only where there is a question of plaintiff having used reasonable care and diligence not to augment or increase the damages. See 17 CJ 1074.

On Page 23, the respondent attempts to hold the City liable because the Legislature of South Dakota extended the time of redemption from tax sales from two to four years.

Further, on Page 24, the statement is made that counsel for the petitioner knew that for a period of years when general tax sale certificates in South Dakota drew 12% interest a fellow resident repeatedly bid down all of the certificates offered in whole counties to as low as 4% interest. Counsel has never heard of anyone in South Dakota doing that.

Counsel cite many cases and rely upon them in which tax deeds were voided. It may be that in some of these cases language is found which would indicate that the Court concluded that a tax deed was void for irregularities in the proceedings leading to its issuance. Whatever the language may be, at least in South Dakota, if the deed may be voided, the purchaser cannot be denied his right to re-

imbursement for the entire amount of taxes paid and for all expenses he is put to. A long quotation is made from the case of Huckstedt v. Jamison, 59 SD 464, 240 NW 506, at Page 30 of the brief of respondent in which the tax deed was held void but the respondent leaves out the portion of this case quoted from the Petitioner's brief on Page 32 holding that the plaintiff attempting to void the tax deed must pay all sums expended in payment of taxes together with interest thereon at the statutory rates as in case of a redemption. On no theory imaginable can the decision of the Eighth Circuit Court of Appeals be sustained when put side by side with the statutes and decisions of the Supreme Court of South Dakota pertaining to damages.

It is submitted respectfully that the Petition should be granted.

Respectfully submitted,

MAX ROYHL
GEORGE E. LONGSTAFF,
Counsel for Petitioner.